

No. 12529

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK WALLACE and R. M. MAKEMSON, do-
ing business as Wallace and Wallace, a partner-
ship,

Appellees.

Transcript of Record

Appeal from the United States District Court,
District of Arizona.

FILED

JUL 10 1950

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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United States Attorney.

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Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court for the
District of Arizona

Phoenix Civil Docket
Civ-998 Phx.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

FRANK WALLACE and R. M. MAKEMSON,
dba Wallace & Wallace, a partnership,
Defendants.

FILINGS-PROCEEDINGS

Date

1947

- Apr. 14— 1 File Govt's complaint (U.S.A. \$15.00).
Apr. 14— 2 File Govt's praecipe for summons.
Apr. 14— Issue summons.
Apr. 14— 3 File Govt's Notice of Motion for Preliminary injunction for hearing Apr. 21, 1947.
Apr. 14— 4 Enter and file Temporary Restraining Order.
Apr. 19— 5 File summons returned by Marshal showing service on deft.
Apr. 19— 6 File cc Restraining Order returned by Marshal showing service on deft.
Apr. 19— 7 File subpoena showing service on J. Bayard Caruthers (see paper No. 7 in Civ.-999 Phx).

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- Apr. 21—— Pltff's Mo. for Preliminary Injunction on reg. for hearing. E. R. Thurman pres. for Govt. Norman Hull and Wm. Spaid pres. for defts. Hear Govt's Mo. for Preliminary injunction. Order preliminary injunction may issue herein. File Govt's exhibit No. 1.
- Apr. 21— 8 File defts' response to Motion for Preliminary Injunction.
- Apr. 21— 9 File defts' Memo. of Points and Authorities.
- May 1—10 File stipulation of counsel that defts. may have to and including May 20, 1947, to answer or otherwise appear.
- May 1—11 File subpoena returned by Marshal showing service on John Morris (See paper No. 13 in Civ-997 PHX.).
- May 1—12 File subpoena returned by Marshal showing service on Herbert Meyer Williams (See paper No. 13 in Civ-997).
- May 5—13 Enter and File Findings of Fact and Conclusions of Law upon Motion for Preliminary injunction.
- May 5—14 Enter and file Decree of Preliminary Injunction.
- May 6—— Fwd. copy of Decree to Counsel for defts.

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May 13—— On mo. E. R. Thurman, order allow counsel for Govt. to withdraw any exhibits admitted in evidence or marked for ident. on hearing of pltfs' mo. for preliminary injunction.

June 2—15 File defts' Answer.

1948

Apr. 19—— On for trial setting or other disposition. Thurman for Govt. Hull for deft. On mo. Thurman order pass on calendar.

1949

Feb. 14—— On for trial setting or other disposition. Thurman for Govt. Norman S. Hull for deft. and suggests dismissal. Thurman moves for setting. Order set for trial May 10, 1949, 10 a.m.

Apr. 15—16 File Pltf's Request for Admissions.

Apr. 25—17 File Defts' Response to Request for Admission.

Apr. 26—— File Pltf's Praecipe for subpoena duces tecum to Vera F. Harris, and John A. Skeen (See Paper No. 35 in Civ-999 Phx.).

Apr. 26—— Issue subpoena duces tecum.

May 6—— Order vacate order setting this case for trial May 10, 1949.

Oct. 31—— Case called pursuant to Rule 14. Thurman for Govt. Norman Hull for deft. Order set for trial Jan. 20, 1950, 10 a.m. with a jury.

1950

- Jan. 11—18 File Pltf's Praeipe for subpena duces tecum to Vera F. Harris and subpenas to John F. Taggert, Roy Maypole, Jeffry Sidebotham, Herbert Meyer Williams and J. B. Caruthers.
- Jan. 11— Issue subpena to Herbert Meyer Williams, John F. Taggert, Roy Maypole, Jeffry Sidebotham, J. B. Caruthers and subpena duces tecum to Vera F. Harris.
- Jan. 13—19 File Plaintiff's Praeipe for subpoenas to Herbert Meyer Williams and Charles K. Wilson.
- Jan. 13— Issues subpoenas to Herbert Meyer Williams and Charles K. Wilson.
- Jan. 17—20 File Marshal's Return to subpoena showing no service on Herbert Meyer Williams.
- Jan. 17—21 File Marshal's Return to Subpoena showing service on Jeffry Sidebotham.
- Jan. 17—22 File Marshal's Return to subpoena showing service on Roy A. Maypole.
- Jan. 17—23 File Marshal's Return to Subpoena showing service on John F. Taggert.
- Jan. 19—24 File Marshal's Return to Subpoena showing service on J. Bayard Caruthers.
- Jan. 19—25 File Marshal's Return to Subpena Duces Tecum showing no service on Vera F. Harris.

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- Jan. 19—26 File Marshal's Return to Subpena Duces Tecum showing no service on Charles K. Wilson.
- Jan. 20—— On for trial. Flynn and Thurman for Govt. Norman S. Hull and James H. Green, Jr. pres. for deft. Flynn now states that due to the inability of the Govt. to locate its principal witness who is reported to be in Mexico, the Govt. is not ready for trial and unable to make any showing as to when the witness will be available. Said counsel for Govt. now moves for dismissal without prejudice. Hull objects to dismissal of case without prejudice and moves that case be dismissed with prejudice. It is ordered that this case be and it is dismissed with prejudice.
- Jan. 24—27 Enter and file Judgment dissolving injunction and dismissing action.
- Mar. 20—28 File Plaintiff's Notice of Appeal. (U.S.A. \$5.00.)
- Mar. 20—— Mail Copy of Notice of Appeal to counsel for defts.
- Mar. 20—29 File Plaintiff's Designation of Record.
- Mar. 20—30 File Plaintiff's Statement of Points on Which Plaintiff-Appellant Intends to Rely.

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- Mar. 30—31 File Stipulation that one copy of record on appeal need be filed with U. S. Court of Appeals.
- Mar. 30—32 Defts' Statement of Proceedings.
- Mar. 30—33 File Defts'. Additional Designation of Record.
- Apr. 18—34 File Plaintiff's Supplemental Statement of Proceedings.
- Apr. 25—35 File Plaintiff's (Amended) Supplemental Statement of Proceedings.
- Apr. 25—— Enter Order that Defts' Statement of Proceedings filed on Mar. 30, 1950, and Pltf's Supplemental Statement of Proceedings filed Apr. 25, 1950, be approved and made a part of the record on appeal in this case.
- Apr. 25—— Prepare and forward Record on Appeal to U. S. Court of Appeals at San Francisco, Calif. by registered mail. (U.S.A. \$5.20.)
-

[Title of District Court and Cause.]

COMPLAINT

I.

This is a civil action brought by the United States of America, as plaintiff, under Sec. 26(b) of the Surplus Property Act of 1944 (50 U.S.C.A., App., Sec. 1635(b)) of which this Court has juris-

diction under Sec. 26(c) of said statute (50 U.S.C.A., App., Sec. 1635(c)).

II.

On information and belief, the defendants Frank Wallace and R. M. Makemson, at all times herein-after mentioned, were residents of Phoenix, Arizona, and are engaged as partners in the business of general contracting under the firm name and style of Wallace & Wallace, in the City of Phoenix, Maricopa County, Arizona.

III.

Between the dates of February 1, 1946, and July 1, 1946, the War Assets Administration, a Government agency, conducted sales at Port Hueneme, California, and Rivers, Arizona, pursuant to the Surplus Property Act of 1944, as amended, and regulations promulgated thereunder, of certain surplus Government property, consisting of new and used Lima 750 shovels, LeTourneau carryalls, Dodge pickup trucks and other motor vehicles and various other kinds of personal property belonging to the United States. The [2*] said surplus property was, in accordance with the aforesaid Act and regulations, available for purchase exclusively by duly certified veterans of World War II who had certified that the surplus property sought to be purchased was for their own personal use or for the maintenance of their established businesses, professions or agricultural activities.

* Page numbering appearing at foot of page of Certified Transcript of Record.

IV.

The said defendants, in connection with the sales aforesaid, for the purpose of securing or obtaining, or aiding to secure or obtain, certain of said surplus Government property, used or engaged in, or caused to be used or engaged in fraudulent tricks, schemes or devices, and entered into an agreement, combination or conspiracy for said purpose, in violation of the provisions of Sec. 26(b) of the Surplus Property Act of 1944 (50 U.S.C.A., App., Sec. 1635(b)) and other statutes of the United States, as hereinafter more fully appears.

V.

Defendants, in or about the month of February, 1946, and prior to the holding of the said sales aforesaid, agreed and conspired among themselves and with a certain veteran of World War II, to acquire certain of said surplus property at said sales by arranging to have said veteran defraud the United States concerning its governmental rights and functions of administering the sale of surplus property under and by virtue of the Surplus Property Act of 1944, as amended, and the rules and regulations promulgated thereunder, and to defraud the United States of and concerning its right to have those who deal with the Government do so honestly; and to defraud the United States of and concerning its governmental right to determine, with a full knowledge of the true facts, whether to sell or not to sell certain surplus property in accordance with the objectives of the said Surplus

Property Act of 1944; and to defraud the United States of and concerning its governmental functions and right to impose conditions and terms of when and to whom it would make sales of such said surplus property; and then and there, in accordance with the said agreement, plan and scheme, said defendants had the said veteran of World War II, for monetary considerations in the nature of commissions, obtain, by means of said veteran's priority certificates, for the sole use, benefit and ownership of the said defendants, with funds furnished by the said defendants, certain war surplus property, to wit: Lima 750 shovels, LeTourneau carryalls, Dodge pickup trucks and other motor vehicles and various other kinds of personal property belonging to the United States, and the said defendants then and there well knowing that said surplus property was available only to veterans of World War II and not for resale, and that all of such matters were under the jurisdiction of the War Assets Administration.

VI.

Pursuant to the agreement, combination and conspiracy aforesaid, said veteran of World War II, at the direction of defendants and with funds furnished by the said defendants to the said veteran, was successful, under and by virtue of his said priority certificates, in acquiring, on the dates and for the purchase prices hereinafter set forth, the following surplus property for and on behalf of the said defendants, to wit:

| Date | Surplus Property | Serial No. | Purchase Price |
|------------|---|------------|----------------|
| 2-27-46 | Lima 750 Shovel | 1N9345 | \$17,315.00 |
| 3-26-46 | LeTourneau Carryall | 523561 | 3,363.75 |
| 4- 9-46 | Dodge Cargo Truck, 1½ ton, Motor #T74-9898 | | 371.46 |
| | Dodge Cargo Truck, 1½ ton..... | 8290536 | 368.16 |
| | Dodge Pickup Truck..... | 8093319 | 395.14 |
| 6- 3-46 | International cargo truck, 2½ ton.... | 25162 | 2,060.00 |
| 6- 8-46 | International dump truck, 2½ ton.... | 39840 | 2,917.97 |
| | International dump truck, 2½ ton.... | 39848 | 2,917.97 |
| | International dump truck, 2½ ton.... | 39976 | 2,917.97 |
| Total..... | | | \$32,627.42 |

VII.

Upon obtaining all of the above-described property and title thereto from the War Assets Administration, said veteran, pursuant to the conspiracy aforesaid, immediately delivered the same, and all thereof, to the defendants, and said defendants thereupon assumed ownership thereof and commenced using the said property, and all thereof, in their said business as general contractors.

VIII.

Upon information and belief, plaintiff alleges that all of said surplus property is now in the exclusive possession, use and control of said defendants.

IX.

By reason of the premises and pursuant to the provisions of Sec. 26 of the Surplus Property Act of 1944 (50 U.S.C.A., App., Sec. 1635), defendants Frank Wallace and R. M. Makemson became,

and are liable, at the election of the United States, to pay to the United States the sum of Two Thousand Dollars (\$2,000.00) for each act committed by them in violation of said statute and double the amount of any damage which the United States may have sustained by reason thereof, or, to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the War Assets Administration for the property obtained, or, to restore to the United States the property thus secured and obtained, the United States retaining as liquidated damages the entire consideration paid the War Assets Administration for said property.

X.

The accomplishment of the purpose and objectives of the Surplus Property Act of 1944, as amended, and of the Regulations of the War Assets Administration issued thereunder, and of the system of disposition of surplus Government property established thereby, depends upon the effective and orderly administration and enforcement of said statute and Regulations and upon strict compliance with all of the provisions thereof to the end that all groups having priority rights with respect to the acquisition of surplus Government property shall have a full and fair opportunity to exercise such rights in the order of their priority. Unless restrained and enjoined by injunction of this Court, the defendants will dispose of said surplus property thus unlawfully obtained to third parties not con-

nected with the conspiracy, all to the immediate and irreparable injury, loss and damage of the plaintiff and the people of the United States.

Wherefore, the United States, as plaintiff, prays that:

1. A temporary restraining order issue, restraining until the determination of plaintiff's motion for a preliminary injunction herein, the defendants, and each of them, their servants, agents, employees, attorneys, representatives, and all others acting in concert or participation with them, or at their request or direction, or any of them, from directly or indirectly moving, transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the situs, form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI hereof, or any part of said property.

2. A preliminary injunction issue against the said defendants enjoining them, and each of them, their servants, agents, employees, attorneys, representatives, and all others acting in concert or participation with them, or at their request or direction, or any of them, from directly or indirectly moving, transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the suits, form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI hereof, or any part of said property.

3. Judgment be entered in its favor against the defendants for restoration to the United States of America, at defendants' expense, of the 9 pieces of surplus property described in Paragraph VI hereof in the same condition as when acquired by defendants, the United States to retain as liquidated damages the entire consideration given the War Assets Administration for said property.

4. In the alternative, but only in the event the relief prayed for in the preceding paragraph is impossible of attainment, judgment be entered in its favor against defendants for the sum of \$32,627.42, together with interest and the costs of suit, which with the similar sum already received by War Assets Administration for the aforesaid property, will result in plaintiff receiving as liquidated damages and defendants paying, upon satisfaction of said judgment, a sum equal to twice the consideration agreed to be given to the War Assets Administration for the said property obtained.

5. This Court grant such other, further and different relief as to the Court may seem just and proper.

FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

United States of America,
District of Arizona—ss.

J. Bayard Caruthers, being first duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters stated therein on information and belief, and as to those matters, he believes the same to be true.

J. BAYARD CARUTHERS.

Subscribed and sworn to before me this 10th day of April, 1947.

GERTRUDE I. BITTING,
Deputy Clerk, U. S. District Court, District of
Arizona.

[Endorsed]: Filed April 14, 1947.

[Title of District Court and Cause.]

RESTRAINING ORDER

Upon the verified Complaint filed herein, and it appearing to the satisfaction of the Court that the defendants named therein, acting in aid and concert, will dispose of the 9 pieces of surplus property described in Paragraph VI of the Complaint to third parties and thus render impossible their restoration to the United States, unless restrained

by order of the Court, and good cause appearing therefor,

It Is Hereby Ordered:

1. That the said defendants, and each of them, their servants, agents, employees, attorneys, and all others acting in concert or participation with them, at their request or direction, or any of them, are hereby restrained and enjoined from directly or indirectly moving, transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the situs, form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI of the Complaint.

2. This Order shall expire on the 23rd day of April, 1947, at the hour of 10 o'clock A.M.

Done In Open Court this 14th day of April, 1947, at the hour of 1:40 P.M.

/s/ DAVE W. LING,
Judge.

[Endorsed]: Filed April 14, 1947. [3]

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above-Named Defendants:

You, and each of you, will please take notice that on the 21st day of April, 1947, at the hour of ten o'clock A.M., or as soon thereafter as counsel may be heard, in the Courtroom of the Hon. Dave W. Ling, Judge of the above-entitled court, in the United States Courthouse Building, Phoenix, Arizona, plaintiff will present its motion for a preliminary injunction enjoining the defendants, and each of them, until further order of the Court, from disposing of certain surplus property obtained as the result of sales conducted by the War Assets Administration between February, 1, 1946, and July 1, 1946, as will more fully appear from the Complaint on file herein.

Said motion will be based upon the verified Complaint on file herein, upon all of the files and records in the case and upon such further affidavits, exhibits, evidence and oral testimony as shall be adduced at said time and place.

FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

In support of its Motion above-mentioned, plaintiff will rely upon the following points and authorities:

1. The United States District Court for the District of Arizona has full power and jurisdiction to hear, try and determine the instant suit and to grant the relief prayed for herein.

Surplus Property Act of 1944, Sec. 26(b) and 26(c) (50 U.S.C.A., App. §1635(b) and §1635(c)).

Judicial Code, Sec. 24 (1); (28 U.S.C.A. 41(1)).

FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

[Endorsed]: Filed April 14, 1947.

[Title of District Court and Cause.]

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Defendants, appearing for the sole purpose of resisting plaintiff's application for a preliminary injunction as prayed for in Paragraph II of the

prayer to the complaint herein, and without otherwise appearing or answering the complaint, respond, as follows:

1. Allege that the complaint fails to state a claim upon which injunctive relief can be granted against defendants, and shows upon its face that plaintiff has an adequate remedy at law.

2. Admit exclusive possession, use and control of the equipment listed in Paragraph VI, save and except Dodge Cargo Truck, Serial No. 8290536, and allege that such truck was disposed of long prior to the institution of this action. Allege that such equipment is being used on an Arizona State Highway project in Maricopa County, approximately 25 miles north of Phoenix, and that such use, and similar use elsewhere in Arizona, is required to fulfill existing highway construction contracts binding upon defendants.

3. Deny each and all of the allegations contained in lines 6 to 10, page 5, Paragraph X, and allege that defendants do not intend to, nor will they dispose of such equipment, or of [5] any piece or article thereof, pending disposition of this action or the sooner Order of this Court.

4. Allege that the granting of injunctive relief, as prayed for in the Complaint, would impose undue hardship upon defendants and would result in forcing defendants to breach existing contracts and to cease business, all without corresponding benefit or advantage to plaintiff.

Wherefore, defendants pray that the restraining order of April 14, 1947, be dissolved, and that plaintiff's application for a preliminary injunction be denied.

EVANS, HULL, KITCHEL,
RYLEY & JENCKES,

By /s/ NORMAN S. HULL,

By /s/ WM. SPAID,

Attorneys for Defendants.

State of Arizona,
County of Maricopa—ss.

R. M. Makemson, being duly sworn, deposes and says that during all times mentioned in plaintiff's complaint he was a partner of Wallace & Wallace, the partnership composed of the defendants herein; that he has read the foregoing Response to plaintiff's Notice of Motion and knows the contents thereof; that the allegations therein contained are true in substance and in fact.

R. M. MAKEMSON.

Subscribed and sworn to before me this 21st day of April, 1947.

/s/ WM. H. LOVELESS,

Clerk U. S. District Court.

[Endorsed]: Filed April 21, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION OF
LAW UPON MOTION FOR PRELIMI-
NARY INJUNCTION

Findings of Fact

This matter came on regularly for hearing on Monday, the 21st day of April, 1947, before the Court without a jury, Frank E. Flynn, United States Attorney, and E. R. Thurman, Assistant U. S. Attorney, appearing as attorneys for plaintiff, and Evans, Hull, Kitchel, Ryley & Jenckes appearing by Norman S. Hull and William Spaid as attorneys for defendants, and from the evidence introduced the Court finds the facts as follows, to wit:

I.

That at all times mentioned in plaintiff's complaint the defendants Frank Wallace and R. M. Makemson were a partnership doing business at Phoenix, Arizona, as Wallace & Wallace, and engaged in the general contracting business.

II.

That the War Assets Administration is an agency of the Government of the United States of America.

III.

That the War Assets Administration, pursuant to the Surplus Property Act of 1944, as amended, and the regulations promulgated thereunder, be-

tween February 1, 1946, and July 1, 1946, conducted [6] sales of certain surplus government property which was available for purchase exclusively by duly certified veterans of World War II who had certified that the surplus property sought to be purchased was for their own personal use or for the maintenance of their established businesses, professions or agricultural activities.

IV.

That Herbert M. Williams was a veteran of World War II, and as such was duly certified to purchase war surplus property under and by virtue of said Surplus Property Act of 1944.

V.

That the said defendants, in connection with the sales aforesaid, for the purpose of securing or obtaining all the surplus property mentioned in Paragraph VI of plaintiff's complaint, engaged in fraudulent tricks, schemes and devices and entered into a conspiracy with the said veteran for said purpose, in violation of the provisions of Title 50 U.S.C.A., App., Sec. 1635(b).

VI.

That pursuant to said conspiracy defendants were successful in acquiring and assumed ownership of all the surplus property set forth and described in Paragraph VI of plaintiff's complaint.

VII.

That all of said surplus property is now in the exclusive possession, use and control of said defendants.

VIII.

That the defendants will transfer or otherwise dispose of said surplus property described in the complaint to third parties, thus causing irreparable injury to plaintiff by depriving it of a remedy elected under Section 26(b) of the Surplus Property Act of 1944.

Conclusion of Law

As a conclusion of law from the foregoing facts, the Court finds that the plaintiff's motion for a temporary injunction, as prayed for in plaintiff's complaint, should be granted.

Dated at Phoenix, Arizona, this 5th day of May, 1947.

/s/ DAVE W. LING,
Judge.

Receipt of copy acknowledged.

Lodged April 25, 1947.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

DECREE OF PRELIMINARY
INJUNCTION

The above-entitled cause and the application of plaintiff for a preliminary injunction having come on regularly for hearing at 10 o'clock A.M., April 21, 1947, before the Honorable Dave W. Ling, Judge of the above-entitled court, upon the verified Complaint and Notice of Motion for Preliminary Injunction, the defendants Frank Wallace and R. M. Makemson having been duly served with said Complaint and Notice of Motion, and the said defendants appearing by and through their attorneys, Evans, Hull, Kitchel, Ryley & Jenckes, by Norman S. Hull and William Spaid, and plaintiff, United States of America, appearing by Frank E. Flynn, United States Attorney, and E. R. Thurman, Assistant U. S. Attorney, and the parties having announced that they were ready upon the hearing of the Motion for Preliminary Injunction, the Court proceeded in the premises, and oral and documentary evidence having been introduced on behalf of the plaintiff and no evidence having been introduced on behalf of the defendants, and the evidence being closed, the matter was submitted to the Court for its decision, and after due deliberation and consideration the Court finds the issues in favor of the plaintiff and against the defendants;

And it appearing to the Court that plaintiff is

entitled to the relief sought and that the Complaint herein seeks to enforce [7] the liability and obtain one of the remedies provided by Section 26(b) of the Surplus Property Act of 1944;

An it further appearing to the satisfaction of the Court that the defendants Frank Wallace and R. M. Makemson, acting in aid and concert, will transfer or otherwise dispose of the surplus property described in the Complaint to third parties, thus causing irreparable injury to plaintiff by depriving it of a remedy elected under Section 26(b) of the Surplus Property Act of 1944, unless restrained by order of this Court pending trial and final determination of the above-entitled action;

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed:

That pending trial and final determination of the above-entitled action and until further order of the Court, the said defendants, Frank Wallace and R. M. Makemson, and each of them, their servants, agents, employees, attorneys, and all others acting in concert or participation with them, at their request or direction, or any of them, are hereby restrained and enjoined from directly or indirectly transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI of the Complaint.

Dated at Phoenix, Arizona, this 5th day of May, 1947, at 3:20 o'clock P.M.

DAVE W. LING,

United States District Judge.

Approved as to Form Pursuant to Rule 7.

FRANK E. FLYNN,

United States Attorney.

By /s/ E. R. THURMAN,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

EVANS, HULL, KITCHEL,

RYLEY & JENCKES,

By
Attorneys for Defendants.

Lodged April 25, 1947.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

ANSWER

Defendants answer the Complaint, as follows:

I.

Admit the allegations of paragraphs I and II, and that War Assets Administration sold and the veteran purchased the surplus property mentioned in paragraphs III and VI, and that the same, save and except Dodge Cargo Truck, Serial No. 8290536

which was disposed of prior to suit, is in defendants' possession, use and control, as alleged in paragraph VIII.

II.

Denies each and every allegation contained in paragraphs IV, V, VII, IX and X, and the allegations of paragraph III, concerning the purpose for which such property was available for purchase and the allegations of paragraph VI, concerning the manner in which the veteran purchased the same, together with all allegations of the Complaint not herein expressly admitted.

III.

Allege that defendants rented the Lima 750 shovel and purchased the other property from the veteran for use, and has been and now is using the same in performing road construction projects for the State of Arizona and for the United States. [8]

Wherefore, defendants pray that plaintiff take nothing by its action herein and that defendants have such other and further relief as may be warranted in the premises.

EVANS, HULL, KITCHEL,
RILEY & JENCKES,

By /s/ NORMAN S. HULL,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 2, 1947.

In the United States District Court
for the District of Arizona

October, 1948, Term

MINUTE ENTRY OF WEDNESDAY,
FEBRUARY 2, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

Misc.

It Is Ordered that the general calendar of civil cases in the Phoenix Division of this Court be called Monday, February 14, 1949, at 10:00 o'clock a.m., for trial setting or other disposition pursuant to Rule 14 of this Court. [9]

RULES OF PRACTICE

Of the United States District Court
for the District of Arizona
Effective September 16, 1938

RULE 14

Trial Calendar and Setting of Causes; Dismissal
for Want of Prosecution

At such time or times as the court shall designate the general calendar of all pending criminal cases will be called and all such causes will then be set for trial on some particular day, continued, or otherwise disposed of: Provided, however, That criminal cases, when at issue may be set at any

time for trial at such time and in such order as the arraignments and pleas of defendants may render most expedient for the ready dispatch of the business before the court.

At such time or times as the court may designate the general trial calendar of all civil cases at issue and ready for trial will be called, and all such causes will then be set for trial on some particular day, continued or otherwise disposed of. At least 5 days' notice of the call of such calendar shall be given by the clerk to all counsel having cases thereon. Civil cases in which issue is joined subsequent to the call of the general trial calendar may, on not less than 5 days' notice in writing, be placed upon the motion calendar to be set for trial.

Causes not answered by either party on the call of the general trial calendar may be continued to the next call of the calendar. Cases in which issue is joined shall be set for trial at the general call of the calendar, or dismissed for want of prosecution, except for good cause shown, the court may continue the same until the next call of the calendar. Cases which have been pending for more than 1 year without any proceedings having been taken therein during such year may be dismissed as of course, for want of prosecution by the court on its own motion at a general call of the calendar.

[Endorsed]: Filed Sept. 16, 1938.

EDWARD W. SCRUGGS,

Clerk, United States District Court for the District
of Arizona. [10]

In the United States District Court
for the District of Arizona

October, 1949, Term

MINUTE ENTRY OF MONDAY,
OCTOBER 31, 1949

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case is now called for trial setting or other disposition pursuant to Rule 14 of this court. E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. Norman Hull, Esquire, is present for the defendant.

It Is Ordered that this case be and it is set for trial January 20, 1950, at 10:00 o'clock a.m. with a jury. [11]

In the United States District Court
for the District of Arizona

October, 1949, Term

MINUTE ENTRY OF FRIDAY,
JANUARY 20, 1950

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney, and E. R. Thurman, Esquire, Assistant United States Attorney, are present for the Government. Norman S. Hull, Esquire, and James H. Green, Jr., Esquire, are present for the defendant, and announce ready for trial.

Frank E. Flynn, Esquire, now states that due to the inability of the Government to locate its principal witness who is reported to be in Mexico, the Government is not ready for trial and unable to make any showing as to when the witness will be available. Said counsel for the Government now moves for dismissal without prejudice.

Norman S. Hull, Esquire, objects to dismissal of case without prejudice and moves that case be dismissed with prejudice.

It Is Ordered that this case be and it is dismissed with prejudice.

(Docketed Jan. 20, 1950.) [12]

In the District Court of the United States
for the District of Arizona
No. Civ. 998 Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK WALLACE and R. M. MAKEMSON, dba
Wallace & Wallace, a partnership,
Defendants.

JUDGMENT

The above-entitled action having come on regularly for trial at 10:00 a'clock a.m., January 20, 1950, and defendants having announced ready for trial and plaintiff having announced not ready for trial, and the court having heard the oral motion of defendants to dismiss said action with prejudice and to dissolve the decree of preliminary injunction issued May 5, 1947, and the court having heard the arguments of counsel upon the motion, does hereby find that said motion should be granted and said action dismissed.

Wherefore, it is ordered, adjudged and decreed that the preliminary injunction issued May 5, 1947, be dissolved and quashed and that the said action be, and the same hereby is, dismissed, with prejudice to any subsequent suit upon said claim.

Dated January 24, 1950.

/s/ DAVE W. LING,
District Judge.

[Endorsed]: Filed and Docketed January 24,
1950. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 24, 1950.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant United States
Attorney.

Of Counsel:

/s/ JOSEPH M. FRIEDMAN,
Special Assistant to the
Attorney General.

/s/ J. GREGORY BRUCE,

/s/ JOHN G. ROBERTS,
Attorneys, Department of
Justice, Washington, D. C.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1950. [14]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF-APPELLANT INTENDS TO
RELY

The points on which the United States intends to rely, on the appeal of this cause, are:

(1) It was an abuse of discretion for the trial court to have denied plaintiff's motion to dismiss without prejudice, and to grant defendants' motion for dismissal with prejudice.

(2) It was error for the trial court to have dismissed the action with prejudice without having offered plaintiff-appellant an alternative method of trial.

To sustain its contentions as to the above two points, the United States, as plaintiff-appellant, relies upon those portions of the Record which it has designated for inclusion in the Record on Appeal, and of such designated record, the United States particularly relies upon the following:

(1) Complaint. [15]

(2) Findings of Fact and Conclusions of Law upon Motion for Preliminary Injunction.

(3) Order dismissing the case with prejudice.

(4) Final Judgment, dissolving the injunction and dismissing the action.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant United States
Attorney.

Of Counsel:

/s/ JOSEPH M. FRIEDMAN,
Special Assistant to the
Attorney General.

/s/ J. GREGORY BRUCE,

/s/ JOHN G. ROBERTS,
Attorneys, Department of
Justice, Washington, D. C.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States of America, as plaintiff-appellant herein, hereby designates the following portions of the record, proceedings, and evidence in the above-entitled case to be contained in the Record on Appeal:

- (1) All docket entries.
- (2) Complaint.
- (3) Temporary Restraining Order.
- (4) Notice of Motion for Preliminary Injunction filed by plaintiff.
- (5) Response to Motion for Preliminary Injunction filed by defendants.
- (6) Findings of Fact and Conclusions of Law upon Motion for Preliminary Injunction entered and filed on May 5, 1947.
- (7) Decree of Preliminary Injunction entered and filed on May 5, 1947.
- (8) Defendants' Answer.
- (9) Order setting the case for jury trial at 10:00 a.m. on January 20, 1950. [16]
- (10) Order dismissing case with prejudice entered on January 20, 1950.
- (11) Judgment dissolving the injunction and dismissing the action with prejudice, entered and filed on January 24, 1950.
- (12) Notice of Appeal filed by plaintiff on March 20, 1950.
- (13) All motions for Enlargement of Time, for any purpose, which may be filed by either of the parties hereto prior to the filing and docketing of the Record on Appeal herein, and Orders entered thereon.

(14) Statement of Points on which the United States of America, as plaintiff-appellant, intends to rely.

(15) This Designation of Record.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant United States
Attorney.

Of Counsel:

/s/ JOSEPH M. FRIEDMAN,
Special Assistant to the
Attorney General.

/s/ J. GREGORY BRUCE,

/s/ JOHN G. ROBERTS,
Attorneys, Department of
Justice, Washington, D. C.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1950.

[Title of District Court and Cause.]

STATEMENT OF PROCEEDINGS

The above-entitled action having come on regularly for trial at 10:00 o'clock a.m., January 20, 1950, Mr. Frank E. Flynn and Mr. E. R. Thurman appeared for the plaintiff and Mr. Norman S. Hull and Mr. James H. Green, Jr., appeared for the defendants.

No stenographic report was made of the proceedings which followed.

Upon call of the above-entitled case for trial by the clerk of the court, Mr. Frank Flynn announced for the plaintiff that it was not ready for trial because it did not have present its chief witness. Whereupon, the court asked Mr. Flynn when such witness would be present. In reply, Mr. Flynn stated that the witness was out of the jurisdiction and it was not known when the witness would be available. Mr. Flynn, for the plaintiff, then moved that the action be dismissed without prejudice.

Mr. Hull, attorney for the defendants, opposed the motion and argued that this case had been pending for almost three years and had not yet been brought to trial and that the [17] defendants had suffered damage and would suffer further damage by delay because of the decree of preliminary injunction entered and filed on May 5, 1947. Whereupon Mr. Hull, for the defendants, moved the court to dismiss the action with prejudice for want of prosecution.

The court then ruled that defendants' motion to dismiss with prejudice for failure to prosecute the action was granted and ordered the clerk to make such entry accordingly.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ NORMAN S. HULL,
Attorneys for Defendants.

The foregoing Statement of Proceedings, in conjunction with the Supplemental Statement of Proceedings filed April 25, 1950, is hereby approved.

/s/ DAVE W. LING,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

ADDITIONAL DESIGNATION OF RECORD

Frank Wallace and R. M. Makemson, as defendants-appellees, hereby designate the following portions of the record, proceedings and evidence in the above-entitled case to be contained in the Record on appeal:

(1) Miscellaneous Minute entry on February 2, 1949;

(2) Local Court Rule No. 14;

(3) Statement of Proceedings upon Defendants' Motion to Dismiss with prejudice, January 20, 1950.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ NORMAN S. HULL,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950. [18]

[Title of District Court and Cause.]

SUPPLEMENTAL STATEMENT OF
PROCEEDINGS

(Amended)

In addition to the Statement of Proceedings which occurred on January 20, 1950, submitted by attorneys for the defendants, we believe that the record should show that when the United States Attorney stated to the Court that he did not have his chief witness present, and when asked by the Court when his witness would be present, the United States Attorney replied that the witness was in Mexico and that the government was unable to make any definite showing as to when he would be available, but that he has made trips to the United States since he went to Mexico.

Further, that when Mr. Hull, the attorney for the defendants, stated that the case had been pending for almost three years, the United States Attorney stated that a considerable portion of that time was accounted for by the fact that the defendants had made an offer in compromise and that no action was taken while this offer was being considered.

While there was nothing in the proceedings on January 20 indicating the time when the offer was made or when it was rejected by the government, we have no objection to the record showing that

the offer was made on May 6, 1949, and rejected on September 7, 1949.

/s/ FRANK E. FLYNN,

United States Attorney for
the District of Arizona.

The foregoing Supplemental Statement of Proceedings, in conjunction with the Statement of Proceedings filed March 30, 1950, is hereby approved.

/s/ DAVE W. LING,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Frank Wallace and R. M. Makemson, dba Wallace and Wallace, a partnership, Defendants, numbered Civ-998 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries, Local Rule 14, and minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the civil docket entries, Local Rule 14 and minute entries, constitute the entire record on appeal in said case as designated in the Designations filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

1. Civil Docket Entries.
2. Complaint filed April 14, 1947.
3. Restraining Order filed April 14, 1947.
4. Notice of Motion for Preliminary Injunction filed April 14, 1947.
5. Defendants' Response to Motion for Preliminary Injunction filed April 21, 1947.
6. Findings of Fact and Conclusion of Law Upon Motion for Preliminary Injunction, filed May 5, 1947.
7. Decree of Preliminary Injunction, filed May 5, 1947.
8. Answer, filed June 2, 1947.
9. Miscellaneous Minute Entry of February 2, 1949. [20]

10. Local Court Rule No. 14.
11. Minute Entry of October 31, 1949, setting case for trial January 20, 1950.
12. Minute Entry of January 20, 1950, dismissing case with prejudice.
13. Judgment filed January 24, 1950.
14. Notice of Appeal, filed March 20, 1950.
15. Statement of Points on Which Plaintiff-Appellant Intends to Rely, filed March 20, 1950.
16. Appellant's Designation of Record, filed March 20, 1950.
17. Appellees' Statement of Proceedings, filed March 30, 1950.
18. Appellees' Additional Designation of Record, filed March 30, 1950.
19. Appellant's Supplemental Statement of Proceedings, filed April 25, 1950.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$5.20, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the seal of said Court this 25th day of April, 1950.

[Seal] /s/ WM. A. LOVELESS,
Clerk.

[Endorsed]: No. 12529. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank Wallace and R. M. Makemson, doing business as Wallace and Wallace, a partnership, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed April 27, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

